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No. 206

In the Supreme Court of the United States

OCTOBER TERM, 1941

D'OENCH, DUHME & CO., INC., A CORPORATION,
PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, A
CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The judgment of the District Court of the United States for the Eastern District of Missouri (R. 72) was entered without an opinion. The opinion of the Circuit Court of Appeals for the Eighth Circuit (R. 87–94) is reported in 117 F. (2d) 491.

JURISDICTION

The judgment of the United States Circuit Court of Appeals for the Eighth Circuit was entered on February 11, 1941 (R. 94).

A petition for rehearing was denied on March 27, 1941 (R. 99). The petition for a writ of certiorari was filed June 25, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Respondent brought suit in the federal court in Missouri on an accommodation note made in Illinois. Applying Illinois law, the court below held for respondent. The questions are:

1. Whether the failure expressly to find the Missouri rule as to choice of law is error when the rule applied is in fact the same as that of the Missouri courts.

2. Whether the federal district court, in an action instituted by a corporate agency of the United States, must adopt the local rule that the laws of other states must be alleged and proved.

3. Whether respondent's recovery is repugnant to the public policy of Missouri.

STATUTE INVOLVED

The applicable portions of the statute involved are set forth in the Appendix.

STATEMENT

The respondent, Federal Deposit Insurance Corporation, brought suit in the United States District Court for the Eastern District of Missouri upon a promissory note executed by the petitioner

in the sum of $5,000 (R. 3–4). The note had been assigned by the payee, Belleville Bank & Trust Company, to the respondent (R. 13). The petitioner answered, alleging that the note was accommodation paper given to the named payee without consideration, that the respondent had acquired title to the note after maturity, and was not a holder in due course (R. 6–9). The facts as found by the District Court are substantially as follows:

The note in suit, dated Belleville, Illinois, January 1, 1933, was in the principal sum of $5,000, bearing interest at the rate of 6 per cent. Protest, presentation, and notice were waived, and the note was payable at the office of the Belleville Bank & Trust Company, Belleville, Illinois. (R. 66–67).

On or about April 2, 1938, the bank borrowed from respondent the sum of $1,349,558.07, pledging certain collateral as security therefor, including the note here involved (R. 67), which was indorsed without recourse by the bank to the order of the respondent (R. 67). Thereafter, the bank failed to pay its loan to the respondent on demand, and, under the terms of the loan, respondent was empowered to collect in its own name all collateral securing the debt (R. 67). In August, 1938, the respondent made demand upon petitioner for payment of the note in suit (R. 67). Payment was refused and respondent was advised that the note had been given without consideration, petitioner

basing its refusal upon the following facts (R. 67, 71):

In 1918 and 1920, petitioner sold to the bank drainage district bonds in the amount of $5,000, which matured August 1, 1926. Upon maturity, the bank forwarded the bonds to the petitioner to be presented for payment, and the bonds were dishonored by reason of no funds. The cashier of the bank then requested petitioner to execute two notes payable to the bank in the respective amounts of $2,000 and $3,000, which would enable the bank to carry the notes and not show any past due bonds in the bank. Petitioner executed two collateral demand notes, each dated August 1, 1926, and payable to the bank. One of the notes was for $2,000, bearing 6 per cent interest from date; the other note was for $3,000, bearing interest at 5½ per cent. The collateral agreement of each note recited that the corresponding amount of the defaulted drainage district bonds were pledged as collateral. (R. 68.) Under date of August 4, 1926, the Belleville Bank & Trust Company, by its assistant cashier, acknowledged in writing receipt of the two demand notes. There was appended to each of the receipts the following statement: "This note is given with the understanding it will not be called for payment. All interest payments to be repaid." These receipts were not attached to the notes, but were delivered to the petitioner and kept in its possession at all times since. (R. 69.) A search of the

records of the bank in August, 1938, failed to disclose any copies of these receipts (R. 69).

From August, 1926, until March, 1932, petitioner paid the bank interest amounting to $1,601.56. The interest payments were made so as to keep the two notes as live paper (R. 69–70). One or more renewal notes were given prior to the execution of the note upon which suit was brought (R. 70). At the time of the execution of the note in suit, a representative of the bank requested petitioner to execute a new note as the other note or notes had become too old, and accordingly the note of January 1, 1933, was signed (R. 70). On July 30, 1937, $2,000 of the defaulted bonds were sold for $100, and that amount was credited to interest due on the note (R. 70). The note in question was listed as a charged-off asset by the Belleville Bank & Trust Company on July 29, 1935 (R. 70).

The District Court, after finding the foregoing facts, held as a conclusion of law that the respondent was an innocent holder in good faith and for value, that the defense of lack of consideration was not proved to the satisfaction of the court, and that under the facts of the case the petitioner was estopped to assert lack of consideration (R. 71). Thereafter, the court entered additional conclusions of law holding that the note sued on constituted a new contract between the parties, and that the rights of the parties on the notes were governed by the law of the State of Illinois (R. 75). It there-

upon entered judgment for the respondent in the sum of $5,000, with interest thereon from May 1, 1933, and 10 per cent of the principal as attorney fees, making the total judgment $7,376.41 (R. 71–72). On appeal the Circuit Court of Appeals for the Eighth Circuit affirmed, holding that the note was governed by the law of the State of Illinois, and that under the applicable Illinois law the indorsee of a demand note given for the accommodation of the payee and negotiated after maturity, has the status of a holder in due course.

ARGUMENT

1. Petitioner contends (Pet. 11–15) that the court below, in determining what law governed petitioner's obligation as accommodation maker, failed specifically to find and follow the Missouri rule as to choice of law.

While the court below did not specifically refer to the Missouri rule as to the choice of the law which should govern petitioner's obligation, it followed (R. 89) the applicable Missouri rule. In Missouri, as generally, it is well settled that the state in which a note is made payable and in which it is delivered is the place of the contract, and that the obligation of the note is governed by the laws of that state. *Johnson* v. *Gawtry,* 83 Mo. 339, 343; *Long* v. *Long,* 141 Mo. 352, 372–373; *Davis* v. *McColl,* 179 Mo. App. 198, 202, 207. We do not understand petitioner to contend that the Missouri rule is otherwise.

The decision below is not in conflict with *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, No. 741, decided June 2, 1941. The *Klaxon* case, decided after the decision below, held that the federal courts, in cases where jurisdiction depends upon diversity of citizenship, must apply the forum's rule of conflict of laws. Assuming that the doctrine announced in the *Klaxon* case is applicable here, where jurisdiction did not depend upon the accident of diversity of citizenship, the court below in fact applied the choice of law rule of the forum state. In such circumstances, the failure of the court below specifically to refer in its opinion to the Missouri rule of conflict of laws was at most a harmless error, and constitutes no ground for granting a writ of certiorari.

2. Petitioner insists that, under the law of Missouri, the courts of that state can take no judicial notice of the law of a foreign state, unless it be specifically alleged and proved. From this it argues (Pet. 15–20) that a federal court must apply the same rule of evidence as does the forum, and that the courts below were not entitled to take judicial notice of the Illinois statutes and decisions. A conflict with *Waggaman* v. *General Finance Co.*, 116 F. (2d) 254, 257 (C. C. A. 3) is asserted.

The decision in the *Waggaman* case, whatever its correctness,[1] does not conflict with the decision be-

[1] The rule of the *Waggaman* case may be questioned, in the light of the well settled principle that the lower federal

low. There the jurisdiction of the court depended upon diversity of citizenship, and, as the Third Circuit noted (p. 257), the policy of *Erie R. Co.* v. *Tompkins,* 304 U. S. 64 might be thought to reach to the point that the suitors in the federal courts are to be placed under the same procedural burdens as those in the state courts. Since respondent is federally incorporated, however, the federal courts cannot take jurisdiction because of diversity of citizenship. *Bankers Trust Co.* v. *Texas & Pac. Ry.,* 241 U. S. 295, 309–310. The jurisdiction of the federal court in this case arose, instead, from the statute of Congress authorizing respondent to sue and be sued in state and federal courts. Section 12B (j), *infra;* see also *Pacific Railroad Removal Cases,* 115 U. S. 1; Act of February 13, 1925, sec. 12, 43 Stat. 936, 941 (28 U. S. C. sec. 42); *Federal Bank* v. *Mitchell,* 277 U. S. 213. There is nothing in the specific statutory source of jurisdiction, or in the jurisdiction based upon the federal incorporation and ownership of respondent, which suggests that the rule of the *Erie R. Co.* v.

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courts take judicial notice of the laws of all of the states. *Hanley* v. *Donoghue,* 116 U. S. 1, 6; *Mills* v. *Green,* 159 U. S. 651, 657. This Court has repeatedly announced that the purpose of the decision in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, was to obtain equality of results in cases depending upon the accident of diversity of citizenship. Clearly, a procedural rule such as the necessity of alleging and proving foreign law does not come within the evils which that decision undertook to correct.

Tompkins is applicable,[2] and *Deitrick* v. *Greaney*, 309 U. S. 190, suggests an opposite conclusion in the field of federal banking. We respectfully submit, therefore, that the decision of the court below was correct, and that its opinion did not conflict with that of the Circuit Court of Appeals for the Third Circuit in the *Waggaman* case.

3. We see no merit to petitioner's contention that the application of Illinois law, preventing an accommodation maker of a note from pleading lack of consideration even after maturity, is opposed to the public policy of Missouri. The general public policy of Missouri, as expressed by its rule of conflict of laws, is that the rights and obligations of parties to a negotiable instrument are governed by the law of the place where the note is made payable and where it is delivered. *Johnson* v. *Gawtry*, 83 Mo. 339. Petitioner advances no reason and points

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[2] The rule announced in *Erie R. Co.* v. *Tompkins*, *supra*, is probably not applicable in a suit to which the United States is a party. *Board of Commissioners of Jackson County* v. *United States*, 308 U. S. 343, 350, 352; *Royal Indemnity Co.* v. *United States*, No. 817, decided May 26, 1941. Nor does the reasoning which led to the rule adopted in that case suggest that it should apply to corporate agencies or instrumentalities of the United States. The respondent is managed by a board of directors appointed by the President by and with the advice and consent of the Senate. More than 50 per cent of its stock is held directly by the Treasury of the United States. 12 U. S. C. 264 (d). The remaining stock is held by the Federal Reserve banks but does not vote and carries no dividends and is beneficially owned by the United States. 12 U. S. C. 290.

to no Missouri case which indicates that the Missouri courts would find the Illinois rule as to matured accommodation notes so distasteful as to fall before the force of local public policy. Accordingly, the failure of the court below affirmatively to find that the Illinois law which it applied was not repugnant to the law of the forum state is not erroneous.

CONCLUSION

The decision below is correct, and there is no conflict of decisions. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

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APPENDIX

Section 12B of the Federal Reserve Act, as added by Section 8 of the Banking Act of 1933, 48 Stat. 162, 168, 172 (12 U. S. C. 264 (a), (j)) provides in part as follows:

> (a) There is hereby created a Federal Deposit Insurance Corporation (hereinafter referred to as the "Corporation"), whose duty it shall be to purchase, hold, and liquidate, as hereinafter provided, the assets of national banks which have been closed by action of the Comptroller of the Currency, or by vote of their directors, and the assets of State member banks which have been closed by action of the appropriate State authorities, or by vote of their directors; and to insure, as hereinafter provided, the deposits of all banks which are entitled to the benefits of insurance under this section.
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> * * * * * *
>
> (j) Upon the date of enactment of the Banking Act of 1933, the Corporation shall become a body corporate and as such shall have power—
>
> First. To adopt and use a corporate seal.
>
> Second. To have succession until dissolved by an Act of Congress.
>
> Third. To make contracts.
>
> Fourth. To sue and be sued, complain and defend, in any court of law or equity, State or Federal.
>
> Fifth. To appoint by its board of directors such officers and employees as are not otherwise provided for in this section, to de-

fine their duties, fix their compensation, require bonds of them and fix the penalty thereof, and to dismiss at pleasure such officers or employees. Nothing in this or any other Act shall be construed to prevent the appointment and compensation as an officer or employee of the Corporation of any officer or employee of the United States in any board, commission, independent establishment, or executive department thereof.

Sixth. To prescribe by its board of directors, bylaws not inconsistent with law, regulating the manner in which its general business may be conducted, and the privileges granted to it by law may be exercised and enjoyed.

Seventh. To exercise by its board of directors, or duly authorized officers or agents, all powers specifically granted by the provisions of this section and such incidental powers as shall be necessary to carry out the powers so granted.

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